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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN FELIX GARCIA,

Defendant and Appellant.

H041049

(Monterey County

Super. Ct. No. SS130960)

Defendant Juan Felix Garcia pleaded no contest to one count of assault with force likely to cause great bodily injury. (Pen. Code, § 245, subd. (a)(4).)<sup>1</sup> The trial court granted a three-year term of probation and imposed probation conditions, among others, requiring defendant: (1) to pay \$864 for preparation of the probation report and \$81 per month for probation supervision; (2) not to use, purchase, or possess alcoholic beverages; (3) to stay out of places where alcohol is the main item for sale; and (4) to submit to sobriety tests or alcohol testing.

On appeal, defendant claims: (1) the trial court erroneously imposed fees for probation supervision and preparation of the probation report without finding defendant had the ability to pay as required by section 1203.1b; (2) the evidence was insufficient to support an implied finding of his ability to pay; (3) to the extent the first two claims were

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<sup>1</sup> Subsequent unspecified references are to the Penal Code.

forfeited by his trial counsel's failure to object, counsel rendered ineffective assistance; and (4) the alcohol-related probation conditions were improperly imposed under the factors set forth in *People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*).

We hold that defendant forfeited his claims regarding probation-related fees by failing to object in the trial court. Furthermore, defendant cannot establish that his trial counsel was ineffective for failing to object. There was no reason for counsel to object since the order directed defendant to provide financial information to his probation officer for the purpose of conducting an ability-to-pay analysis. In any event, defendant suffered no prejudice because, under section 1203.1b, he may still petition the probation officer or the court for additional hearings regarding his ability to pay during the probationary period. Finally, we conclude that imposition of the alcohol-related probation conditions constituted an abuse of discretion. Accordingly, we will strike the alcohol-related probation conditions and affirm the judgment as modified.

## **I. FACTUAL AND PROCEDURAL HISTORY**

### *A. Facts of the Offense<sup>2</sup>*

On February 2, 2013, complaining witnesses Jane and John Doe went to the South Seaside Police Department to report that they had been threatened by defendant. Jane Doe told the police that defendant was the father of two of her children and that she and defendant had been separated for eight months. She was now in a relationship with John Doe, who had slept at her home the prior night. The couple awoke in the morning to find defendant assaulting John Doe. Jane Doe and defendant's children were present during the attack. Jane Doe took the children and sought help from her nephew, who lived in the main house.

The nephew intervened before John Doe was injured. The nephew told defendant to leave the premises. Thinking defendant had left, John Doe attempted to leave the

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<sup>2</sup> The facts of the underlying offense are summarized from the Probation Officer's Report filed on May 16, 2014.

residence. Defendant, who was lying in wait outside, chased John Doe—first with a screwdriver, then with a spade. But defendant was unable to catch John Doe, who ran to his car and left. Defendant then told Jane Doe he would return with three other people to hurt John Doe. He also threatened to take the children out of Jane Doe’s custody and told her something would happen to her when he returned.

#### *B. Procedural Background*

Defendant pleaded no contest to one count of assault with force likely to cause great bodily injury. (§ 245, subd. (a)(4).) Among other things, the probation officer recommended defendant pay \$864 for the cost of preparing the probation report and \$81 per month for the cost of probation supervision. The recommendation included this condition: “The defendant is ordered to provide the probation officer with financial information for evaluation of his/her ability to pay and is ordered to pay the amount probation determines he/she can afford.” The report noted that defendant had refused to speak with the probation officer about any aspect of the offense or his social history. But when the subject of defendant’s employment history was raised, “defendant angrily brought up the fact that due to his incarceration, the county insured [*sic*] that he would lose his job and have a difficult time finding a new job upon his release.” Regarding defendant’s ability to pay, the report concluded: “The defendant, with no known serious mental or physical medical conditions, is believed to be able to work in order to pay all restitution, along with fines and fees arising from his actions in the instant offense.”

At sentencing on May 16, 2014, the trial court suspended imposition of defendant’s sentence and placed him on probation for three years, including 350 days in county jail as a condition of probation. In accord with the probation officer’s recommendations, the trial court ordered defendant to pay \$864 for the cost of preparing the probation report and \$81 per month for the cost of probation supervision. The court imposed these fees “subject to a hearing if necessary.” The minute order from the sentencing hearing included the following language from the probation report: “The

defendant is ordered to provide the Probation Officer with financial information for evaluation of his/her ability to pay, and is ordered to pay the amount Probation determines he/she can afford.” Defendant lodged no objections to imposition of the fees.

The trial court also imposed the following alcohol-related conditions: (1) that defendant not knowingly use, purchase, or possess alcohol; (2) that he stay out of places where he knows alcohol to be the main item of sale; and (3) that he submit to any field sobriety test or alcohol test of his blood, breath, or urine at the request of any probation officer or peace officer. Defendant objected to these conditions on the basis that he was not under the influence of alcohol at the time of the offense. The court imposed the conditions over defendant’s objection.

## **II. DISCUSSION**

Defendant raises four challenges to the aforementioned probation conditions. First, he argues that imposition of the \$864 fee for preparation of the probation report and the \$81 per month probation supervision fee was improper because the court did not make an ability-to-pay finding as required by section 1203.1b. Second, he argues that if the court made an implied finding on his ability to pay these fees, the finding was not supported by substantial evidence. Third, he argues that if the first two claims were forfeited due to trial counsel’s failure to object, then his counsel rendered ineffective assistance. And fourth, he argues the alcohol-related probation conditions were improper because they were unreasonable under the circumstances.

The Attorney General contends defendant forfeited his claims regarding the probation-related fees by failing to object in the trial court. As to the ineffective assistance of counsel claim, the Attorney General argues that defendant has failed to show his counsel’s conduct fell short of professional standards because counsel may have known defendant had the ability to pay. Finally, the Attorney General concedes the alcohol-related conditions were improperly imposed.

*A. Defendant Forfeited His Claims of Error Regarding Fees Imposed Under Section 1203.1b*

We conclude defendant forfeited any claims of error based on the imposition of fees for the preparation of the probation report and for the cost of probation supervision by failing to object to these fees during sentencing. The recent holdings of the California Supreme Court in *People v. Trujillo* (2015) 60 Cal.4th 850 (*Trujillo*) and *People v. Aguilar* (2015) 60 Cal.4th 862 (*Aguilar*) establish that trial counsel must object to the imposition of fees under section 1203.1b to preserve the issue for appeal.

In *Trujillo*, the court considered a defendant's claim that a trial court improperly imposed fees under section 1203.1b without making an ability-to-pay finding as required by the statute. In rejecting the defendant's claim, the court held: "Notwithstanding the statute's procedural requirements, we believe to place the burden on the defendant to assert noncompliance with section 1203.1b in the trial court as a prerequisite to challenging the imposition of probation costs on appeal is appropriate. [. . .] 'Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention.' [Citation.] In the context of section 1203.1b, a defendant's making or failing to make a knowing and intelligent waiver occurs before the probation officer, off the record and outside the sentencing court's presence. Although the statute contemplates that when the defendant fails to waive a court hearing, the probation officer will refer the question of the defendant's ability to pay probation costs to the court, the defendant—or his or her counsel—is in a better position than the trial court to know whether the defendant is in fact invoking the right to a court hearing." (*Trujillo, supra*, 60 Cal.4th at p. 858.)

The *Trujillo* court also observed that a "defendant who by forfeiture of a hearing is precluded from raising on appeal the issue of ability to pay probation-related fees is not

wholly without recourse.” (*Ibid.*) That is so, the court said, because “ ‘[t]he court may hold additional hearings during the probationary, conditional sentence or mandatory supervision period to review the defendant’s financial ability to pay the amount, and in the manner, as set by the probation officer, . . . or as set by the court pursuant to . . . ’ section 1203.1b. (§ 1203.1b, subd. (c).) Likewise, during the pendency of the judgment rendered under section 1203.1b, the defendant ‘may petition the probation officer for a review of [his or her] financial ability to pay or the rendering court to modify or vacate its previous judgment on the grounds of a change of circumstances with regard to the defendant’s ability to pay the judgment.’ (*Id.*, subd. (f).)” (*Id.* at pp. 860-861.)

Defendant concedes that his challenge on procedural grounds is forfeited under *Trujillo*, but he contends he may still raise his claim regarding sufficiency of the evidence to support the trial court’s implied finding of his ability to pay the fees. While *Trujillo* clearly establishes that a defendant forfeits any claim that the trial court failed to adhere to the procedural requirements of 1203.1b, the opinion is less definitive on whether a defendant also forfeits the claim that his or her ability to pay was not supported by substantial evidence. The *Trujillo* court noted that the issues on appeal in that case had only to do with procedural safeguards, not sufficiency of the evidence: “the [appellate] court found dispositive the circumstance that nothing in the record showed that either the trial court or the probation officer complied with section 1203.1b’s procedural safeguards; in its view, this deficiency compelled reversal even assuming defendant forfeited the sufficiency of evidence argument pertaining to probation-related costs.” (*Trujillo*, *supra*, 60 Cal.4th at pp. 854-855.) Notwithstanding this limitation, the reasoning in *Trujillo*, which relies heavily on the reasoning in *People v. McCullough* (2013) 56 Cal.4th 589, 597 (*McCullough*), supports forfeiture of defendant’s sufficiency of the evidence claim.

In *McCullough*, the court held that “because a court’s imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency

of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal.” (*McCullough, supra*, 56 Cal.4th at p. 597.) Like a booking fee, whether a defendant has the ability to pay probation-related fees is a finding of fact. *McCullough* specifically distinguished booking fees from probation-related fees, noting that “[i]n contrast to the booking fee statutes, many of these other statutes provide procedural requirements or guidelines for the ability-to-pay determination.” (*Id.* at p. 598.) The court observed that “the Legislature considers the financial burden of the booking fee to be de minimis and has interposed no procedural safeguards or guidelines for its imposition.” (*Id.* at p. 599.) Although *McCullough* distinguished probation-related fees from booking fees, *Trujillo*—which directly addressed probation-related fees under section 1203.1b—specifically rejected the notion that this distinction “requires a forfeiture rule different from that articulated in *McCullough*.” (*Trujillo, supra*, 60 Cal.4th at p. 858.) Furthermore, as noted earlier, defendants remain entitled to additional ability-to-pay hearings under section 1203.1b, subdivisions (c) and (f). Thus, we conclude, based on the reasoning in *Trujillo* and the court’s holding in *McCullough*, that defendant has also forfeited his claim of insufficient evidence.

#### B. Trial Counsel was Not Ineffective

Because defendant’s first two claims were forfeited by trial counsel’s failure to object, we will consider defendant’s ineffective assistance of counsel claim. To prevail on a claim of ineffective assistance of counsel, defendant must first show trial counsel’s “performance was inadequate and fell below an objective standard of reasonableness.” (*In re Thomas* (2006) 37 Cal.4th 1249, 1257.) Second, defendant must establish that this deficiency in trial counsel’s performance prejudiced the outcome of the case. (*Strickland v. Washington* (1984) 466 US 668, 690-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) “On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the

challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation.” (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Defendant fails to establish either prong. In this case, the trial court specifically told defendant he was entitled to an ability-to-pay hearing. The minute order further shows that the defendant was ordered “to provide the Probation Officer with financial information for evaluation of his/her ability to pay, and is ordered to pay the amount Probation determines he/she can afford.” Thus, there was no reason for counsel to object to the court’s order.<sup>3</sup> Furthermore, defendant fails to show prejudice because he is statutorily entitled to petition the probation officer or the court for additional hearings on his ability to pay. (§ 1203.1b, subds. (c) and (f).) Accordingly, we reject defendant’s claim of ineffective assistance of counsel.

### C. *Imposition of Alcohol-Related Probation Conditions*

The Attorney General concedes that the trial court improperly imposed the alcohol-related probation conditions. We agree and will accept her concession.

“The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and what conditions should be imposed.” (*People v. Welch* (1993) 5 Cal.4th 228, 233.) “A condition of probation will not be held invalid unless it ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . .’ [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.” (*Lent, supra*, 15 Cal.3d at p. 486, citing *People v. Dominguez* (1967) 256 Cal.App.2d 623, 627.) A trial court’s imposition of conditions of

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<sup>3</sup> The record does not show whether counsel subsequently requested an ability-to-pay hearing.

probation is reviewed for abuse of discretion. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.)

The record contains no facts suggesting defendant was under the influence of alcohol or had consumed alcohol when he committed the offense. And because defendant, who was born in 1965, is of age to legally consume alcohol, the alcohol-related conditions relate to conduct that is not in itself criminal. Finally, the conditions do not relate to future criminality. Thus, these conditions are invalid under *Lent* and the trial court abused its discretion by imposing them.

### **III. DISPOSITION**

The probation conditions requiring defendant not to knowingly use, purchase, or possess alcohol; to stay out of places where he knows alcohol to be the main item of sale; and to submit to any field sobriety test or alcohol test of his blood, breath, or urine at the request of any probation officer or peace officer are stricken. As modified, the judgment is affirmed.

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Márquez, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Mihara, J.